

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

Granville Lloyd Tribble, Jr.,)	
Petitioner,)	
)	
v.)	1:13cv1260 (JCC/JFA)
)	
Harold W. Clarke, <u>et al.</u>,)	
Respondent.)	

MEMORANDUM OPINION

Granville Lloyd Tribble, Jr., a Virginia inmate proceeding pro se, has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his conviction of rape. By Order dated October 31, 2013, the Court directed Tribble to show cause why his petition should not be barred by the statute of limitations. On December 2, 2013, the Court received Tribble's response, in which he appeared to state he was entitled to equitable tolling based on his attorney's failure to timely file a petition for rehearing, which both he and his attorney thought had been properly filed and was tolling the statute of limitations. By Order dated December 20, 2013, the respondent was directed to show cause why the petition should not be granted.

On February 28, 2014, respondent moved to dismiss the petition and Tribble was given the opportunity to file responsive materials, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) and Local Rule 7(K). Tribble filed a response. Dkt. Nos. 22 & 23. Accordingly, this motion is now ripe for disposition. For the reasons that follow, respondent's Motion to Dismiss must be granted, and the petition must be dismissed with prejudice, as time-barred.

I. Background

In the Circuit Court for the City of Portsmouth, a jury convicted Tribble of one count of rape. On May 4, 2009, the court issued a final order and imposed the 25-year sentence previously

fixed by the jury. Case No. 740 CR 0800148601. Tribble filed a direct appeal in the Virginia Court of Appeals, which denied his petition for appeal on December 9, 2009. R. No. 0962-09-1. Tribble then appealed to the Supreme Court of Virginia, which denied his petition for appeal on June 3, 2010. R. No. 092585. Therefore, Tribble's convictions became final on September 1, 2010, the last date he could have petitioned the Supreme Court of the United States for a writ of certiorari.¹

On June 1, 2011, Tribble filed an application for a state writ of habeas corpus in the Circuit Court for the City of Portsmouth, which the court dismissed on February 21, 2012. Case No. L-11-1713. Tribble appealed to the Supreme Court of Virginia, which refused the petition for appeal on October 23, 2012. Tribble's counsel then attempted to file a petition for rehearing on November 5, 2012, but the petition was never received by the Court. On January 14, 2014, Tribble filed an untimely Petition for Rehearing with the Supreme Court of Virginia, which the Court denied on February 14, 2014. Tribble then turned to the federal forum and filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 30, 2013. As noted above, respondent has moved to dismiss the petition, and Tribble has filed a reply. Accordingly, this matter is now ripe for disposition.

II. The Petition is Time-Barred

A petition for a writ of habeas corpus must be dismissed if filed later than one year after (1) the judgment becomes final; (2) any state-created impediment to filing a petition is removed; (3) the United States Supreme Court recognizes the constitutional right asserted; or (4) the factual predicate of the claim could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). Tribble's convictions became final on September 1, 2010, the last date he

¹ See U.S. Sup. Ct. R. 13(1) (petitions for review are timely filed within 90 days of the entry of judgment by a state court of last resort); see also Lawrence v. Florida, 549 U.S. 327, 333 (2007) (reaffirming the inclusion of time for seeking review by the Supreme Court in calculating when direct review of a state criminal conviction becomes final under § 2244(d)).

could have petitioned the Supreme Court of the United States for a writ of certiorari after the Supreme Court of Virginia refused his direct appeal.

In calculating the one-year period, however, the Court must exclude the time during which state collateral proceedings pursued by petitioner were pending. See 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S. 408 (2005) (determining that the definition of “properly filed” state collateral proceedings, as required by § 2244(d)(2), is based on the applicable state law as interpreted by state courts). On June 1, 2011, petitioner filed a state habeas petition in the Circuit Court for the City of Portsmouth, which denied his petition on February 21, 2012. Petitioner then appealed to the Supreme Court of Virginia, which refused and dismissed the appeal on October 23, 2012. Petitioner filed the instant petition on September 30, 2013.²

Between September 1, 2010, the date petitioner’s conviction became final, and June 1, 2011, the date petitioner filed his state habeas petition, 273 days passed. Between October 23, 2012, the date the denial of petitioner’s state habeas petition became final, and September 30, 2013, the date petitioner filed his federal petition, an additional 342 days passed. When these days are combined they establish that the instant petition was filed 250 days beyond the one-year limit.

III. Equitable Tolling Does Not Apply

In Tribble’s response to Respondent’s Motion to Dismiss, he admits that his conviction became final on September 1, 2010, and that 273 days passed before he filed his state habeas petition on September 30, 2013. Pet’r’s Br. Supp. Rule 5(e) Reply [hereinafter: Reply Br.] 5; docket no. 23. While Tribble also acknowledges that the Supreme Court of Virginia dismissed

² For purposes of calculating the statute of limitations, a petition is deemed filed when the prisoner delivers his pleading to prison officials. Lewis v. City of Richmond Police Dep’t, 947 F.2d 733 (4th Cir. 1991); see also Houston v. Lack, 487 U.S. 266 (1988).

his habeas appeal on October 23, 2012, he argues that he timely filed a petition for rehearing on November 5, 2012. Reply Br. 5. He then states that “technical problems occurred during the time after” the electronic submission of his petition for a rehearing, which “was not discovered until five (5) months later, and there was no adjudication by the Supreme Court of Virginia.” *Id.* at 12. He argues that “no order from the Supreme Court of Virginia ever issued until the petitioner submitted the litigation pro se and that resulted in the February 14, 2014 order and finality of state court challenge, which [sic] the toll of statutory bar at 273 days.” Pet. at 14. Thus, petitioner argues that his petition for rehearing filed November 5, 2012, tolled the statute of limitations.

While petitioner does not use the term, in effect he argues that the limitations period should be equitably tolled. The United States Supreme Court has established that equitable tolling is applicable to the § 2244(d)(2) limitations period. *See Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549 (2010) (“Now, like all 11 Courts of Appeals that have considered the question, we hold that § 2244 (d) is subject to equitable tolling in appropriate cases.”). It has been settled in this circuit for some time that § 2244(d) may be subject to equitable doctrines such as tolling under very limited circumstances. *See Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003); *Harris v. Hutchinson*, 209 F.3d 325, 328-29 (4th Cir. 2000). Importantly, however, as the Fourth Circuit Court of Appeals has warned, invocations of equity

... to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individual hardship supplant the rules of clearly drafted statutes We believe, therefore, that any resort to equity must be reserved for those rare instances where - due to circumstances external to the party’s own conduct - it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Rouse, 339 F.3d at 246. For equitable tolling to apply, therefore, a petitioner must establish that (1) extraordinary circumstances, (2) beyond his control and external to his own conduct, (3) prevented him from filing on time. *Id.* On the other hand, it is settled that a petitioner’s own lack

